In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

Nos. 76-1484, 76-1600

JAMES ZURCHER, et al., *Petitioners,*

vs.

THE STANFORD DAILY, et al., *Respondents.*

LOUIS P. BERGNA, et al., *Petitioners,*

vs.

THE STANFORD DAILY, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Page

Page

Statutes — Pages

Other

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OPINIONS BELOW

The opinions below are reproduced in the Petitions.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitions.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Petitions.

STATEMENT

These petitions seek review of a judgment of the Court of Appeals For the Ninth Circuit, which affirmed a judgment of the United States District Court for the Northern District of California (Hon. Robert J. Peckham). The District Court granted Respondents' motion for summary judgment on the merits (Pet. App. "C", 353 F.Supp. 124), 1/ thereafter granted Respondents' motion for an award of attorneys' fees (Pet. App. "D", 366 F.Supp. 18), and fixed the amount of those fees at $47,500 (Pet. App. "E", 64 F.R.D. 680). The Court of Appeals affirmed (Pet.

1/ The appendices in the two petitions herein are identical, even as to pagination. References to the body of each petition will be cited as "Bergna Pet." in No. 76-7600 and as "Zurcher Pet." in No. 76-1484.

App. "A"), and a petition for rehearing was denied (Pet. App. "B").

The controversy concerns a search of the offices of The Stanford Daily, a student-published newspaper at Stanford University, conducted by Petitioners pursuant to a search warrant issued by the Municipal Court for the Palo Alto-Mountain View Judicial District. (I C.T. 14-17.) The ostensible purpose of the search was to locate and obtain certain photographs of a demonstration believed to be in the Daily's unpublished photograph files. (Id.) It is undisputed that at the time of the search Petitioners had no cause to believe that anyone connected with the Daily was involved in unlawful activity, that unlawful activity was being conducted at the Daily's offices, or that contraband was being stored there. See 353 F.Supp., at 127, Pet. App., at 12.

On Monday, April 12, 1971, at approximately 5:45 p.m., four of the Petitioners appeared at the offices of the Daily and, pursuant to the warrant, proceeded to search its offices. (II C.T. 291, 295.) During the course of the search, the officers examined filing cabinets, the contents of desks, shelves and wastebaskets. (I C.T. 350-51, at Para. 15; IIIA C.T. 923-25, at Paras. 2-5, 937-39.) The desks contained, and thus the officers were in a position to see, notes taken by reporters in the course of interviews

conducted for the purposes of gathering news, some of which contained information given in confidence and on the express understanding that the name of the source would not be disclosed. (IIIA C.T. 900-901, at Para. 25; id. 925, at Para. 6.) The officers were in a position to see and examine business and personal correspondence of the Daily and members of its staff (IIIA C.T. 925, Para. 5; id., 939; I C.T. 351, Para. 21), although they now maintain that none was actually read. It is undisputed that the search did not locate any unpublished photographs of the demonstration in question, and no materials were seized. 353 F.Supp., at 127, Pet. App., at 13.

Uncontroverted affidavits presented to the District Court established the adverse impact that this search had on the Daily's ability to gather news. In addition, affidavits of experienced and prominent journalists from around the country demonstrated the profoundly chilling effect which such a search would have on the ability of a journalistic organization to carry out its functions. In summary, they established that (1) such a search totally disrupts the newsgathering and disseminating activities of a paper; (2) to the extent confidential material is revealed (or even perceived by others to be vulnerable to such disclosure), vital sources of news will be impaired and access to events will be blocked; (3) materials not the object of the

search--some of which may be highly confidential--are subjected to entirely unnecessary exposure despite the lack of any governmental interest in such inspection; (4) unlike the issuance of a subpoena or subpoena duces tecum, the ex parte issuance and execution of a search warrant deprives the newspaper and newsman of an opportunity for judicial control; (5) such a search jeopardizes a newspaper's credibility; and (6) such a search creates a substantial risk of self-censorship.

Upon this record, the District Court granted Respondents' Motion for Summary Judgment. It held that the Fourth Amendment--considered in light of the especially stringent standards required for searches which threaten to invade First Amendment interests--rendered unlawful Petitioners' search of The Stanford Daily offices. The District Court wrote:

> "The basic question in this case is whether third parties--those not suspected of a crime--are entitled to the same, if not greater, protection under the Fourth Amendment than those suspected of a crime. More specifically, are law enforcement agencies required to explore the subpoena duces tecum alternative before obtaining a search warrant

against third parties for materials in their possession? . . . [T]he Court holds that third parties are entitled to greater protection, particularly when First Amendment interests are involved. It is the Court's belief that unless the Magistrate has before him a sworn affidavit establishing proper cause to believe that the materials in question will be destroyed, or that a subpoena duces tecum is otherwise "impractical", a search of a third party for materials in his possession is unreasonable per se, and therefore violative of the Fourth Amendment." (353 F.Supp., at 127, Pet. App., at 14).

The District Court's reason for applying especially stringent Fourth Amendment standards to the search involved in the present case appears in subsequent portions of the District Court's opinion:

> "The other aspect of defendants' argument--that newspapers, reporters and photographers have no greater Fourth Amendment protections than other citizens--is also without merit. The First Amendment is not superfluous.

Numerous cases have held that the First Amendment "modifies" the Fourth Amendment to the extent that extra protections may be required when First Amendment interests are involved. See, e.g., A Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L. Ed.2d 809 (1964); Marcus v. Search Warrants, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961); Demich, Inc. v. Ferdon, 426 F.2d 643 (9th Cir. 1960), vacated and remanded on other grounds, 401 U.S. 990, 91 S.Ct. 1223, 28 L.Ed.2d 528 (1971); Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2nd Cir. 1969), cert. denied, 397 U.S. 920, 90 S.Ct. 929, 25 L.Ed.2d 101 (1970). See also NAACP v. Alabama, 357 U.S. 449 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958)." (353 F.Supp., at 134, Pet. App., at 30-31).

At the time of its original decision on the merits, the District Court declined to enjoin similar future searches by Petitioners, expressing its belief that they would comply with the legal principles set forth in its decision. 353 F.Supp., at 136, Pet. App., at 35-36. It added that "in the unlikely event that defendants do conduct such a search against plaintiffs

in the future, plaintiffs are free to renew their motion for a permanent injunction." Id. The District Court also awarded Respondents the sum of $47,500 in attorneys' fees. 366 F.Supp. 18, 64 F.R.D. 680, Pet. App. "D" and "E".

The Court of Appeals affirmed. That court adopted in its entirety the opinion of the District Court on the merits. Pet. App. at 2. Accordingly, the Court of Appeals' opinion discusses only certain procedural issues raised on appeal by Petitioners, some of which are now the subject of these petitions. Thus the Court of Appeals rejected the contention that Petitioners' professed good faith insulates them from declaratory relief; found the Civil Rights Attorneys' Fees Awards Act (hereafter called "the Act") applicable to cases pending on appeal at the time of its passage; and concluded that the Act applied to cases such as this one.

ARGUMENT

I.

THE FOURTH AND FIRST AMENDMENT ISSUE DECIDED BELOW PRESENTS NO QUESTION WARRANTING THIS COURT'S REVIEW

Plainly, the merits of this controversy between the Stanford Daily and local law enforcement officials do not warrant review by this Court. The only legal proposition involved is the

general rule that any search which is unreasonable under all the facts and circumstances of the situation violates the Fourth Amendment. "'[T]he question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment.'" South Dakota v. Opperman, 428 U.S. 364, 372 (1976), quoting Cooper v. California, 386 U.S. 58, 61 (1967) (emphasis added by Opperman). "'The test of reasonableness cannot be fixed by per se rules; each case must be decided on its own facts.'" Id. at 373, quoting Coolidge v. New Hampshire, 403 U.S. 443, 509-510 (1971) (Mr. Justice Black, concurring and dissenting).

"A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." Roaden v. Kentucky, 413 U.S. 496, 501 (1973). Under the obvious principle of Roaden, the District Court for the Northern District of California here was plainly correct in taking the view that "[t]he First Amendment is not superfluous . . . to the extent that extra [Fourth Amendment] protections may be required when First Amendment interests are involved." 353 F.Supp. at 134, Pet. App., at 30 (original emphasis).

This court has also repeatedly so held. E.g., Stanford v. Texas, 379 U.S. 476,

484-485 (1965). The District Court properly applied that established notion to condemn the present case of unnecessary rummaging through the files and editorial offices of a campus newspaper, and the Court of Appeals affirmed it for doing so.

Petitioners seek to inflate this decision into a "ruling that would work a drastic change in the traditional, nationwide practice of issuing search warrants on probable cause to believe that seizable items are in a particular place" (Bergna Pet., at 8) -- a ruling of "public importance and far-ranging effect . . . by its nature unconditional and sweeping . . . [constituting an] unprecedented extension of the Fourth Amendment's . . . language . . . applicable to the federal government and the states in all warrant contests" (Zurcher Pet., at 7). These extravagant and alarmist protestations simply ignore the District Court's careful application of the First and Fourth Amendments together in the context of this particular case. They would have amazed the District Court below, which expressly refused in this very case to extend its ruling beyond the immediate context of a newspaper office search; 2/ and they would have boggled

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2/ Following the entry of the District Court's decision and opinion on the merits of this case, local

the Ninth Circuit, which did not find the case sufficiently vexing or far-reaching to warrant the writing of its own opinion on the merits of the Fourth and First Amendment controversy.

2/ continued.

police conducted a search of patients' files in the psychiatric clinic of the Stanford University Hospital pursuant to a search warrant that plainly did not conform to the requirements of the District Court's ruling regarding newspaper office searches. Respondents (plaintiffs below) promptly moved for a preliminary injunction on the basis of this incident. In the words of the District Court (64 F.R.D. at 684, Pet. App., at 61):

"This motion, which was made after a declaratory judgment had been entered . . . , evidently was triggered by plaintiffs' fear that a police search of the Stanford Hospital evidenced defendants' intention to violate the spirit if not the letter of the court's judgment. The motion was denied by minute order -- but only after defendant Bergna represented to the court that defendants would not engage in searches of the premises of newspapers. The minute order . . . referred to this representation."

Of course we do not contend that the case lacks novel features. The fact situation which gave rise to it is thankfully rare, and required the District Court to apply general, settled, unquestionable Fourth Amendment doctrines in an unusual context. But petitioners' efforts to rip the District Court's decision out of that context and to project it vastly into other very different settings is improvident. Petitioners ask this Court not merely to "entertain constitutional questions in advance of [any] necessity" for doing so, Parker v. County of Los Angeles, 338 U.S. 327, 333 (1949), but also to consider those questions upon a record that does not squarely present or adequately focus them.

II.

THE GRANTING OF DECLARATORY RELIEF BELOW PRESENTS NO ISSUE MERITING REVIEW BY THIS COURT

The Zurcher Petition asserts that it was improper for the District Court to grant declaratory relief against Petitioners because they assertedly did not act in bad faith. It characterizes the District Court's decision as "a 'no fault' theory." Zurcher Pet., at 9-11. This contention is not repeated in the Bergna Petition.

Review in this Court is certainly unnecessary to consider this contention. Police officers have a

qualified immunity from the imposition money damages where they have acted in good faith. Pierson v. Ray, 386 U.S. 547, 555-58 (1967). But this Court has never held or even intimated that the conduct of police officers or other public officials not provably in bad faith is beyond the scrutiny of courts in cases seeking injunctive or declaratory relief. Petitioners cite no case in support of this remarkable proposition, and an unbroken line of decisions by this Court from Ex Parte Young, 209 U.S. 123 (1908) to Linmaric Associates, Inc. v. Township of Willingboro, __U.S.__, 52 L.Ed.2d 155 (1977) allows injunctive relief (to say nothing of the less drastic remedy of declaratory relief afforded in this case) against governmental officials where damages might not be available. As the Court of Appeals said, "[e]xtensions of [the qualified immunity] rule to suits like the present one, seeking injunctive and declaratory relief, has been rejected by the courts." Pet. App. "A", at 3, citing Rowley v. McMillan, 502 F.2d 1326, 1332 (4th Cir. 1974); Hodge v. Hedrick, 391 F.Supp. 91 (E.D. Va. 1974), Wood v. Stickland, 420 U.S. 308, 315 n.6 (1975); National Treasury Employees Union v. Nixon, 492 F.2d 587, 609 (D.C. Cir. 1974); Gouge v. Joint School Dist. No. 1, 310 F.Supp. 984, 990 (W.D. Wis. 1970); Richmond Black Police Officers Ass'n v. City of Richmond, 386 F.Supp. 151, 154 (E.D. Va. 1974); Saffron v. Wilson, ___ F.Supp. ___ (D.D.C. decided Jan. 2, 1975); Safeguard Mutual Ins.

Co. v. Miller, 472 F.2d 732, 734 (3d Cir. 1973). 3/ In addition to the cases cited by the Court of Appeals, see Peek v. Mitchell, 419 F.2d 575, 578

3/ We are uncertain whether Petitioner Zurcher means here to repeat his contention, advanced in the Court of Appeals, that because he assertedly did not personally participate in the search of the Daily, he may not be made a defendant in an action for injunctive or declaratory relief. The contention, of course, is inapplicable to the four police officers who conducted the search or to District Attorney Brown, who obtained the warrant. In any event, the contention is without merit.

Zurcher is the Chief of Police of the City of Palo Alto. The issue of his alleged non-involvement was not raised in the District Court before summary judgment was granted, and the record contains no evidence substantiating that claim. Moreover, the search was conducted by his subordinates, whose authority derives from him, and whose past conduct was and future conduct will be subject to his direction. Zurcher's alleged non-participation would doubtless be relevant to the question of damages, but

(6th Cir. 1970); United States v. Clark, 249 F.Supp. 720, 727 (S.D. Ala. 1965).

III.

THE AWARD OF ATTORNEYS' FEES INVOLVES NO ISSUE WARRANTING THIS COURT'S REVIEW

Petitioners complain of the award of attorneys' fees under the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. §1988, last sentence ("the Act"). They argue that the Act should not have been applied to this case, which was pending on appeal to the Court of Appeals at the time of its

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3/ continued.

here the District Court awarded no damages and, indeed, even refrained from issuing an injunction. It merely declared the rights of the Daily in relation to the District Attorney and the Palo Alto Police Department, and it was in that connection that Chief Zurcher was properly named as a defendant. Langford v. Gelston, 364 F.2d 197, 205 (4th Cir. 1966); Hernandez v. Noel, 323 F.Supp. 779,783 (D. Conn. 1970); Houser v. Hill, 278 F.Supp. 920, 928-29 (M.D. Ala. 1968); Cottonreader v. Johnson, 252 F.Supp. 492, 499 (M.D. Ala. 1966).

passage, and that in any event fees may not be awarded against an unsuccessful defendant who enjoys absolute immunity from an award of money damages, or qualified immunity from damages unless there has been a finding that the defendant had acted in bad faith. Neither of these contentions presents an issue meriting the grant of certiorari.

A. Congress Intended the Act to Apply to Pending Cases.

Congress explicitly demonstrated its intent that the Act apply to pending cases and authorize the award of fees for services rendered prior to the Act's effective date. The Report of the House Judiciary Committee unambiguously states:

> "In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. Bradley v. Richmond School Board, 416 U.S. 696 (1974)." (H.R. Rep., No. 94-1558, 94th Cong., 2d Sess. 4 n.6 (1976) (hereafter "H.R. Rep.").

This same point was made

without objection in both the House 4/ and Senate 5/ debates. Moreover, on the floor of the House a motion to recommit the bill was offered by Congressman Ashbrook for the purpose of obtaining an amendment to make the Act prospective only. That motion was defeated by a vote of 268 - 104. See 122 CONG.REC. H12166 (Oct. 1, 1976).

Petitioners argue that the application of the Act to cases pending on appeal works a "manifest injustice" under Bradley v. Richmond School Board, 416 U.S. 696 (1974). Bradley, of course, held legislation authorizing attorneys' fees in Title VI cases to be retroactive, and found no "manifest injustice" in doing so. Bradley did not suggest that a court's perception of unfairness might override an express legislative direction; rather, the rule it articulated was intended to govern where, as in that case, the legislative will on the question of retroactivity was uncertain. See id., at 716 and n.23. Here, as already shown, Congress expressed with unmistakable clarity its intent that the Act apply retroactively to pending cases. Moreover, this case involves anything but "manifest

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4/ See 122 CONG.REC. H12155 (Cong. Anderson); id., at H12160 (Cong. Drinan).

5/ 122 CONG.REC. S17052 (Sen. Abourezk).

injustice." At the very outset, The complaint filed in this case sought attorneys' fees. See I C.T. 13. For nearly the entire time it was pending in the District Court, the rule prevailing in the Northern District of California allowed for an award of attorneys' fees on the "private attorney general" theory. See, e.g., La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Calif. 1972). While the matter was still before the District Court, the Court of Appeals for the Ninth Circuit approved the rule of the La Raza case and held that attorneys' fees could be awarded in Civil Rights Act suits. Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974). While this case was pending on appeal, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) disapproved the rule of those cases, and subsequently Congress acted to reinstate the law as it existed at the time the District Court ruled. Petitioners' expectations can, therefore, hardly be said to have been frustrated by the passage of the Act. 6/

6/ Petitioners' complaint that a "sanction" has been imposed upon them "for performing duties legal at the time" (Zurcher Pet., at 13; see also Bergna Pet. at 22) is without basis in fact. While it is true that at the time of the

Petitioners also view the fee award as a "manifest injustice" because

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6/ continued.

search, the entitlement of a prevailing plaintiff in a Civil Rights Act suit to an award of fees was uncertain, no part of the award is either punishment or compensation for the actions of Petitioners on the date of the search. Rather, the fee award stems from the subsequent decision of Petitioners--essentially a continuing one--to contest this suit and to insist, as Petitioners Bergna, et al., did in their pleadings, that should the occasion be presented in the future they would again conduct a search of the type which prompted this action. I C.T. 27.

This distinction--between penalties or damages for primary conduct, on the one hand, and an award of fees incurred in litigation to determine the legality of that conduct, on the other--is a significant one which Petitioners overlook. It is for that reason that the Act expressly provides that the fee award will be treated "as part of the costs." See S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 & n.6 (1976) (hereafter

it imposes a financial exposure upon "individuals and . . . not publicly funded governmental entities . . . ." Zurcher Pet., at 13. Were that statement true, their quarrel, of course, would lie with Congress. But the specter of modestly paid governmental employees being compelled to bear the fee award in this case is altogether false. Petitioners have omitted to disclose to this Court that, as the District Court found (see Pet. App., at 52), under California law both the costs of defense and any award must be paid by the public entity which employed the public employees against whom the award is made where, as in this case, they were acting within the scope of their employment. Calif. Govt. Code §825. 7/ Thus the City of

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6/ continued.

"S. Rep."); see also Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Stevens, J., concurring) (fees are costs and thus not within Eleventh Amendment bar to damage recovery from a State).

7/ That the District Court was correct in finding that the California indemnity statute is applicable to Civil Rights Act suits so that "the public, and not the individual officer, will bear the responsibility for litigation

Palo Alto and the County of Santa Clara -- not Petitioners -- will ultimately bear these costs.

For these reasons, the question of the Act's applicability to the present case presents no important issue of federal law. Nor is the judgment in conflict with decisions of other courts, for the opinions of the lower courts are unanimous in finding that Congress intended the Act to apply to all pending cases. See, e.g., Bond

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7/ continued.

and pay any judgment for attorney's fees" (Pet. App., at 53) is now settled; last year the California Supreme Court expressly held the indemnification provisions applicable to Section 1983 actions against police officers, relying upon and citing with approval the District Court's analysis in the Stanford Daily case. Williams v. Horvath, 16 Cal.3d 834, 846-47 (1976).

Even without an express indemnification statute, the federal court has the power under the Act to direct that the fee award be paid from public funds. See note 15, infra; Finney v. Hutto, 548 F.2d 740 (8th Cir. 1977).

v. Stanton, 555 F.2d. 172 (7th Cir. 1977); Finney v. Hutto, 548 F.2d 740 (8th Cir. 1977); Rainey v. Jackson State College, 551 F.2d 672 (5th Cir. 1977); Martinez Rodriguez v. Jiminez, 551 F.2d 877 (1st Cir. 1977); Wade v. Mississippi Co-Op Extension Service, 424 F.Supp. 1242 (N.D. Miss. 1976); Gary W. v. State of Louisiana, 429 F.Supp. 711 (E.D. La. 1977).

B. The Act Does Not Apply Common Law Immunities to Fee Awards and Does Not Require a Showing of "Bad Faith" As a Condition of Awarding Fees.

Petitioners Bergna, et al., argue that the absolute immunity of prosecutors from money damages (Imbler v. Pachtman, 424 U.S. 409 (1976)) likewise bars an award of attorneys' fees. 8/ (Bergna Pet., at 20). Although the point they make is not entirely clear, Petitioners Zurcher, et al., appear to contend that police officers cannot be liable for fees absent a determination that they acted in bad faith. See Zurcher Pet., at 9-11. Although Petitioners do not say so, they presumably mean to assert that the qualified immunity from damages for reasonable acts taken in good faith (see, e.g., Pierson v. Ray, 386 U.S. 547, 555-58 (1967)) extends to awards of attorneys' fees. In short, Petitioners apparently contend that in passing the Civil Rights Attorneys' Fees Awards Act of 1976, Congress silently intended to preserve all immunities applicable to money damages, thereby altogether exempting those, such as judges and prosecutors, with absolute immunity and limiting the availability of fee awards as to others, such as police officers (Pierson v. Ray, supra), school officials (Wood v. Strickland, 420 U.S. 308 (1975)), and executive officers (Scheuer v. Rhodes, 416 U.S. 232 (1974)), to cases in which the defendants have acted in bad faith.

Petitioners seek an interpretation of the Act which would quite literally render this legislation meaningless, for even without specific legislation the courts had uniformly asserted the power to award attorneys' fees in "bad faith" cases. Petitioners' reading of the Act is therefore completely illogical. It is, moreover, wholly inconsistent with the unambiguous legislative history of this carefully scrutinized and fully debated

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8/ Petitioners Bergna, et al., make the same point regarding the absolute immunity from damages afforded to judges under Pierson v. Ray, 386 U.S. 547 (1967). Bergna Pet., at 19-20. No such question is presented here, for the judge who issued the warrant was dismissed as a party to this litigation. II C.T. 386.

legislation. It is likewise at odds with lower court authority in attorneys' fee cases decided both prior and subsequent to the enactment of the Civil Rights Attorneys' Fees Awards Act of 1976.

1. The question of whether attorneys' fees may be awarded to the prevailing plaintiff in a Civil Rights Act suit against a defendant who is absolutely immune from liability for money damages or, as to others, without a finding of "bad faith" is solely one of legislative intention. 9/ None of

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9/ It is plain that the Eleventh Amendment poses no barrier to this award of attorneys' fees. In the first place, its immunity extends only to actions against a State and not to suits against municipalities or counties. See, e.g., Lincoln County v. Luning, 133 U.S. 529 (1890); Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 287 (6th Cir. 1974). In this case, the defendants were all employees of either the County of Santa Clara or the City of Palo Alto. Moreover, this Court held in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) that actions brought under civil rights laws enacted

this Court's decisions finding either an absolute or qualified immunity against

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9/ continued.

pursuant to the Congressional authority conferred by Section 5 of the Fourteenth Amendment may be maintained "which are constitutionally impermissible in other contexts." Id. The Court specifically held that, in such circumstances, the Eleventh Amendment does not preclude an award for attorneys' fees. The Civil Rights Attorneys' Fees Award Act of 1976 was unquestionably founded upon Section 5 of the Fourteenth Amendment. See, e.g., S. Rep., at 5; H.R. Rep., at 7 n.14. Every court which has considered the issue has held that the Eleventh Amendment does not bar fee awards authorized by the Act. E.g., Bond v. Stanton, 555 F.2d 172 (7th Cir. (1977); Finney v. Hutto, 548 F.2d 740 (8th Cir. 1977); Rainey v. Jackson State College, 551 F.2d 672 (5th Cir. 1977); Martinez Rodriquez v. Jiminez, 551 F.2d 877 (1st Cir. 1977); Wade v. Mississippi Co-op Extension Service, 424 F.Supp. 1242 (N.D. Miss. 1976); Gary W. v. State of Louisiana, 429 F.Supp. 711 (E.D. La. 1977).

money damages has ever held that such immunity was constitutionally compelled or that Congress was without power to legislate a broader exposure. See Tenney v. Brandhove, 341 U.S. 367, 372 (1951); Pierson v. Ray, supra; Wood v. Strickland, supra; Scheuer v. Rhodes, supra; O'Connor v. Donaldson, 422 U.S. 563, 576-77 (1975); Imbler v. Pachtman, supra. Thus in Pierson v. Ray, supra, at 554, the Court found that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." As the Court recently said, "Tenney [v. Brandhove, supra] squarely presented the issue of whether the Reconstruction Congress had intended to restrict the availability in §1983 suits of those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials." Imbler v. Pachtman, supra, at 417-18. Yet Petitioners advance their theories of immunity without grappling with the legislative history of the Act or otherwise attempting to address the controlling question of Congress' intent.

2. If the Act was intended by Congress to exempt those with absolute immunity from money damages, and to permit the award of attorneys' fees only in cases involving "bad faith" so that a qualified immunity against money damages might also be overcome, it went to a good deal of trouble for nothing. The Act was responsive to this Court's

decision in Alyeska, in which this Court acknowledged that, even in the absence of legislative direction,

> "a court may assess attorneys' fees . . . where the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . .' [citations] These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress." (421 U.S. at 258-59).

See also Hall v. Cole, 412 U.S. 1, 5 (1973); Sims v. Amos, 340 F.Supp. 691, 694 (M.D. Ala.), aff'd., 409 U.S. 942 (1972) (per curiam); 6 MOORE'S FEDERAL PRACTICE ¶54.77[2]. Petitioners' interpretation of the Act treats it as no more than a codification of the status quo. That view could be sustained only by ignoring both the obvious legislative purpose and what the Court of Appeals called the Act's "crystalline" (Pet. App., at 5) legislative history.

3. Not a word of the extensive legislative history of the Act supports the Petitioners' construction of the Act, which perhaps explains their disinclination to address it. To the

contrary, the record documents Congress' intention to go well beyond the "bad faith" exception acknowledged in Alyeska,10/ and to authorize the award of fees to prevailing plaintiffs in the usual -- not the exceptional -- case. Thus the Senate Judiciary Committee said:

> "It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to exercise the rights protected by [the Act], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968)." (S. Rep., at 4.)

The legislative intent that fees be awarded as to defendants who

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10/ Congress was, of course, well aware that fees could, under Alyeska, be awarded in "bad faith" cases. See, e.g., S. Rep., at 5 n.7; H.R. Rep., at 2 n.1.

might be immune from an award of money damages and even though "bad faith" had not been shown was explicitly stated in the House Judiciary Committee's Report:

> "[W]hile damages are theoretically available [in Civil Rights Act cases], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. [Citing Wood, Scheuer, and Pierson]. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases brought under the provisions covered by H.R. 15460, only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees." (H. Rep. at 9).

And on the floor of the Senate, Senator Abourezk stated that one of the Act's

purposes was to eliminate the necessity, created by Alyeska, of adjudicating the good faith of the defendants:

> "[The Act] will also result in a significant saving of judicial resources. At present, due to the Alyeska decision, a court must analyze a party's actions to determine bad faith in order to award attorneys' fees. This is a complex, time-consuming process often requiring an extensive evidentiary hearing. The enactment of this legislation will make such an evidentiary hearing unnecessary in the many civil rights cases presently pending in the Federal courts." (122 CONG.REC. S17052).

That Congress deliberately meant to authorize the award of fees in cases of this type could hardly be made plainer than by the Judiciary Committee's explicit reference with approval to decisions -- including this very case -- awarding fees without regard to the good or bad faith of the defendant:

> "It is intended that the amount of fees awarded under S. 2278 be

governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecunicary in nature. The appropriate standards, see Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974); and Swann v. Charlott-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'

Davis, supra; Stanford Daily, supra, at 684." (S. Rep., at 6).

4. As the foregoing quotation from the Senate Judiciary Committee Report indicates, Congress intended the Act to restore the pre-Alyeska rules and standards for awarding fees in Civil Rights Act cases which had evolved in the lower courts.11/ The prior law, which forms the background against which Congress acted, provides no support for the notion that immunity from damages extends to an award of attorney's fees.

It has long been the rule that public entities or employees may be taxed costs even though liability

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11/ Thus the Senate Judiciary Committee Report added: "This bill creates no startling new remedy--it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's [Alyeska] decision." Id., at 6; see also H.R. Rep., at 6-9.

for damages may be barred.12/ Congress was aware of that rule (see S. Rep., at 5) and reflected its intent that the statutory immunity from damages not also bar a fee award by providing in the Act that fees be treated "as part of the costs."

Further, Congress was of course aware that, prior to Alyeska, those courts which had awarded attorney's fees under the "private attorney general" rationale had done so without pausing to inquire whether the

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12/ See, e.g., Fairmont Creamery Co. v. State of Minnesota, 275 U.S. 70 (1927); Sims v. Amos, 340 F.Supp. 691 (M.D. Ala.), aff'd., 409 U.S. 942 (1972) (per curiam); Boston Chapter N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017, 1028-29 (1st Cir. 1974), cert. denied sub nom. Director of Civil Service v. Boston Chapter N.A.A.C.P., Inc., 421 U.S. 910 (1975); Class v. Norton, 505 F.2d 123, 126 (2d Cir. 1974); Samuel v. University of Pittsburgh, 538 F.2d 991, 999 (3d Cir. 1976); Gates v. Collier, 70 F.R.D. 341, 347-48 (N.D. Miss. 1976); Welsch v. Likins, 68 F.R.D. 589, 594-95 (D. Minn. 1975), aff'd., 525 F.2d 987 (8th Cir. 1975) (per curiam).

defendants had acted in "bad faith".13/ Indeed, Bradley v. Richmond School Board, supra, itself refutes Petitioners' theory. In Bradley, the District Court had awarded attorney's fees on, inter alia, the ground of the school board's bad faith. See

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13/ See, e.g., Brandenberger v. Thompson, 494 F.2d 885, 888 (9th Cir. 1974); Souza v. Travisono, 512 F.2d 1137, 1138-39 (1st Cir. 1975), vacated and remanded for further consideration in light of Alyeska, 423 U.S. 809 (1976). Indeed, of the thirteen decisions cited by this Court in Alyeska as exemplars of those cases in which the "private attorney general" rationale had been applied (see 421 U.S., at 270 n.46), in all but three the question of the defendant's bad faith was treated as irrelevant to the question of awarding fees, and in the other three cases, Fairley v. Patterson, 493 F.2d 598, 606 (5th Cir. 1974); Lee v. Southern Home Sites Corp., 444 F.2d 143, 144 (5th Cir. 1971); Cornist v. Richland Parish School Board, 495 F.2d 189, 192 (5th Cir. 1974), the bad faith of the defendants was viewed as a possible alternative basis of the fee award.

53 F.R.D. 28, 39-40 (E.D. Va. 1971). The Court of Appeals reversed, finding that the board had not acted in bad faith or been "unreasonably obdurate." See 472 F.2d 318, 320-27 (4th Cir. 1972). This Court reversed the Court of Appeals, reinstating the District Court's fee award, on the basis of the recently enacted legislation authorizing fee awards in Title VI cases. In so doing, however, the Court did not discuss the "bad faith" issue, let alone disapprove the Court of Appeals' determination that the school board had not been in bad faith; it simply found that Congress had authorized fee awards, and that such authority applied to pending cases.14/ Thus a finding of bad faith was not found by this Court to be a necessary condition for the award of attorneys' fees.

5. Petitioners cite no decision of any court in support of their interpretation of the Act. We know of none. The new Act has been uniformly applied to authorize fees against defendants sued in their official capacity without regard to their good faith or bad faith. See, e.g., Finney v. Hutto, 548 F.2d 740 (8th Cir.

14/ The defendants in Bradley had, of course, an immunity against money damages absent a finding of bad faith. See Wood v. Strickland, supra.

1977); Martinez Rodriquez v. Jiminez, 551 F.2d 877 (1st Cir. 1977) (explicitly holding that claim of bad faith need not be considered in order to award fees); Rainey v. Jackson State College, 551 F.2d 672 (5th Cir. 1977); Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977). Wade Mississippi Co-op Extension Service, 424 F.Supp. 1242 (N.D. Miss. 1976);15/ McCormick v.

15/ In Wade, the District Court expressly found that certain individual defendants had not been in bad faith. It held that they could be liable for fees in their official capacities but in light of their good faith could not be liable for fees in their individual capacities. As the District Court understood the effect of that distinction, the fees would be payable out of public funds but not out of the defendants' own resources. This distinction is not significant for purposes of the present case because the defendants were all sued in their official capacity and, under California law (see p. 20, supra), the fee award will by paid by public entities.

For this reason, the present case presents no occasion to consider whether, absent a finding of bad faith, a fee award might be

Attala City Board of Education, 424 F.Supp. 1382 (N.D. Miss. 1976); Gary W. v. State of Louisiana, 429 F.Supp. 711 (E.D. La 1977); Wilson v. Chanceller, 425 F.Supp. 1227 (D. Ore. 1977); Georgia Association of Educators v. Nix, __F.Supp.__ No. C-74-1870 A,

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15/ continued.

directed at a public employee in his individual capacity so that the ultimate economic burden of that award would rest on the employee and not on the public entity which employed him. The Senate Judiciary Committee Report may imply a negative answer, for it states that "it is intended that the attorneys' fees . . . will be collected either directly from the official, in his official capacity, or from the public entity." Id., at 5 n.7. Even prior to the passage of the Act, some courts had drawn this distinction, allowing the fees to be payable by the public entity but not by the employee, at least in the absence of proof of the employee's bad faith. See, e.g., Class v. Norton, 505 F.2d 123, 126-28 (2d Cir. 1974); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 286 (6th Cir. 1974); compare Thonen v. Jenkins,

decided Jan. 26, 1977 (N.D. Ga.); Commonwealth of Pennsylvania v. O'Neill, 431 F.Supp. 700 (E.D. Pa.

15/ continued.

517 F.2d 3 (4th Cir. 1975); (fee award against employee in individual capacity proper where finding of "obdurate obstinacy"). The issue of whether an employee who acted in good faith may be liable for fees may, as a practical matter, be academic if, as the Court of Appeals held in Finney v. Hutto, supra, fees can be awarded against a public entity not specifically named as a party where its employee is sued in his official capacity. This procedure solves the "problem" by which Petitioners purport to be troubled--namely, that municipal entities are not "persons" which may be sued under 42 U.S.C. §1983. Bergna Pet., at 20 n.12.

1977). No decision has been reported which supports Petitioner's interpretation of the Act.

CONCLUSION

The petition for certiorari should be denied.

DATED: July 26, 1977.

Respectfully submitted,

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